BAIL SLIP

The appellant herein [Viz.] Basheer Ahamed, was directed to be released on bail by the order of this Court dated 30.4.2003 and made in Crl.M.P.No.4531/2003 in Crl.Appeal 742/03.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:3-7-2007

CORAM

THE HON'BLE MR.JUSTICE R. REGUPATHI

CRL.APPEAL NO.742 OF 2003

Basheer Ahamed

.... Appellant

vs

State rep by
Inspector of Police,
All Women Police Station
B-2, R.S.Puram Police Station

...Respondent

Criminal Appeal filed under Sec.374 Cr.P.C against the Judgment made in S.C.No.392 of 2002 dated 22.4.2003 on the file of learned Sessions Judge (Magalir Neethimandram), Coimbatore.

For appellant : Mr.K.R. Sankaran for
M/s C.D. Johnson

For respondent : Mr.Hasan Mohd.Jinnah
Govt.Advocate (Crl.Side)

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JUDGMENT

The appellant is accused of committing offence punishable under Sec.376 IPC. On conclusion of the trial, the appellant was convicted by the learned Sessions Judge (Magalir Neethimandram), Coimbatore for the said offence and was sentenced to undergo 7 years Rigorous Imprisonment with fine of Rs.20,000/-, in default, to undergo simple imprisonment for 1 year and out of fine amount of Rs.20,000/-, Rs.10,000/- was ordered to be given to the victim girl as compensation. Aggrieved against the conviction and sentence, the present appeal has been preferred before this Court.

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2.The prosecution case in a nutshell is as below:

P.W.1, the victim girl, aged about 22 years at the time of occurrence, was friendly with the appellant for 10 years. On 28.6.1997 at 2.00 p.m, when the parents of the victim girl were away from the residence, the appellant/accused entered into the residence of the victim girl and closed the doors. Though the victim objected for the same, she was pushed down on the cot. The accused overpowered the victim girl by closing her mouth with his hands, she could not escape from his clutches and therefore, the appellant has committed rape without her consent.

3. It is the further case of the prosecution that at the time when the appellant went out from her residence, P.W.4 and P.W.5, who were neighbours, have seen the accused and when they questioned the victim girl, she divulged the act committed by the accused. After a few weeks, when P.Ws 4 and 5 questioned the victim when she was sitting on a depressed mood, she told them that her menses skipped and she may be pregnant. Thereafter, P.Ws.4 and 5 informed this to the appellant/accused, for which, the appellant replied that this must not be informed to his parents and requested P.Ws.4 and 5 to help her for aborting the pregnancy. However, the appellant promised P.Ws.4 and 5 that he would marry the girl. Accepting such promise, on 6.8.97, the victim was taken to a private hospital and on examination, her pregnancy was confirmed. The appellant requested the Medical Officer to terminate her pregnancy, for which, the victim was asked to come again on 8.8.97. On 8.8.97, the victim, accompanied by P.Ws.4 and 5 and the accused, went to the hospital and her pregnancy was terminated. On seeing the victim in a depressed mood, P.Ws.2 and 3, mother and father of the victim, questioned her, and the victim girl/P.W.1 divulged every thing to them. Thereafter, P.Ws.2 and 3 questioned the appellant/accused, for which, the accused promised them that he would marry their daughter at a later stage.

4. Subsequently during 1997, 1998 and 1999 whenever the appellant was enquired about this, he was evading. However, on 2.8.2000, the appellant fixed betrothal with some other girl and therefore on the same day, it was reported to Zamath, as both the victim girl and the appellant belong to Muslim community. When an enquiry was conducted by the President and Members of Zamath, the appellant had accepted the facts and promised them that he would marry the victim. Thereafter, since the appellant refused to comply with such promise, the members of Zamath advised P.W.1 to approach the police. Accordingly, a complaint, Ex.P.1 dated 9.11.2000 has been given to the police, resulting in registration of the case in Cr.No.45 of 2000, for the offence punishable under Sec.376 IPC. On conclusion of the investigation, final report has been filed for the offence punishable under Sec.417 IPC. However, case has been committed by the learned Magistrate to the Court of Sessions for the offence punishable under Sec.376 IPC and charges were framed for the offence under Sec.376 IPC and trial was taken up.

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5. The victim girl was examined as P.W.1 and she has narrated what had happened to her. She has deposed that on 28.6.1997 at about 2.00 p.m, the appellant/accused had trespassed into her residence and committed forcible rape on her with a promise that he would marry her. When the appellant came out from her residence, he was seen by P.Ws.4 and 5. When they questioned PW-1 she informed them about the act committed by the appellant. After a few weeks, when P.Ws 4 and 5 questioned her when she was sitting in a depressed mood, she told them that her menses skipped and she may be pregnant. Thereafter, P.Ws.4 and 5 informed this to the appellant/accused, for which, the appellant replied that this must not be informed to his parents and requested P.Ws.4 and 5 to help her in aborting the pregnancy. However, the appellant promised P.Ws.4 and 5 that he would marry the girl. Accepting such promise, on 6.8.97, the victim was taken to a private hospital and on examination, her pregnancy was confirmed. The appellant requested the Medical Officer to terminate her pregnancy, for which, P.W.1 was asked to come again on 8.8.97. On 8.8.97, the victim accompanied by P.Ws.4 and 5 and the accused, went to the hospital and her pregnancy was terminated. On seeing the victim in a broken mood, P.Ws.2 and 3, parents of PW-1 questioned her, and PW-1 narrated the entire happenings. Thereafter, P.Ws.2 and 3 questioned the appellant/accused, for which, he replied that he would marry the victim after some time. However, on 2.8.2000, the appellant fixed betrothal with some other girl and therefore on the same day, it was reported to Zamath. When an enquiry was conducted by the Members of Zamath, the appellant had accepted the facts and promised them that he would marry the victim but subsequently, refused to do so, resulting in filing of the complaint.

6. P.Ws.2 and 3, mother and father of P.W.1 corroborated the evidence of P.W.1. P.Ws.4 and 5 also have corroborated the evidence of P.W.1, to the extent that she informed them about the act committed by the appellant on 28.6.1997 and also subsequent abortion in a private clinic. P.W.12, who is sister of P.W.1 has also corroborated the evidence of P.Ws.1 to 3. P.Ws.6, 7, 8 and 13 are the Members of Zamath, who corroborated the testimony of P.W.1 regarding the enquiry conducted by them and also with regard to the promise made by the appellant. P.W.9 is a doctor in a private clinic who did not support the case of the prosecution. However, he was not treated hostile. P.W.10 is the Medical Officer, who has given certificate Ex.P.2 dated 30.11.2000 regarding the potency of the appellant. P.W.11 is also a Medical Officer who examined the victim and has given his opinion Ex.P.3, and opined that the victim girl has been subjected to sex. P.W.14 is the Investigating Officer, who has spoken about the examination of the witnesses and filing of final report.

7. The learned trial Judge, after perusal of evidence of P.Ws.1 to 14 and Exs.1 to 5, questioned the appellant with regard to the incriminating circumstances appearing in evidence against him and the appellant denied the commission of the offence. Neither defence witnesses nor exhibits were marked.

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8. The learned trial Judge, on perusal of the materials available on record and after considering the oral and documentary evidence, convicted the appellant as aforementioned.

9. The learned counsel for the appellant submits that the age of the victim is 22 years and the appellant is 23 years. It is the positive case of P.W.1 that the appellant was friendly with her and even 3 months prior to the occurrence, such an attempt has been made and she came to know that such friendship is not love but the appellant really wanted to have sex with her. Under such circumstances, on that day i.e. on 28.6.97, when the appellant entered into the residence, she would have shouted, whereby she could have attracted P.Ws.4 and 5, the neighbours who were staying next to her residence. On perusal of her such admission in the cross examination, her consent is apparent. Moreover, even on the day, she has not resisted, which shows her consent. Therefore, she being a major, aged about 22 years, the act committed by the appellant/accused cannot be categorised for an offence punishable under Sec. 376 IPC. Moreover, the act committed by the accused was not at all informed to her parents, but it was divulged to them only after abortion i.e., on 8.8.97. Even thereafter, it was not informed to Zamath, but a complaint has been given to the Zamatah only on 2.8.2000.

10. The learned counsel for the appellant submits that there is delay of more than 3 years in lodging the complaint before the Zamath and police. Such delay must be taken serious note of. When the consent of the victim girl/P.W.1 is substantiated, the evidence of P.Ws.2 and 3 viz., the parents of the victim girl and P.W.12, sister of P.W.1 and P.Ws.4 and 5 the neighbours may not assume any relevance. The evidence of President and Members of Zamath P.Ws.6 to 8 and 13 also may not be taken as a vital piece of evidence for the progress of prosecution, since they are only panchayatadars, three years subsequent to the act committed by the appellant. Though it is the case of these witnesses that documentary materials were available for conducting such enquiry and a report has also been prepared, no such document has been filed before this Court. Further, performing abortion by P.W.9 to P.W.1 has not been substantiated by prosecution. Even in the cross examination, P.W.9 has denied termination of pregnancy and abortion to P.W.1. Further, during the course of examination, P.W.1 she has specifically stated that a different name viz., Parveen has been given to the doctor, who performed abortion and further asserted that such fact has been informed to Investigating Officer. However, the investigating officer contradicted that no such information has been divulged by P.Ws 1 and P.W.2.

11. The evidence of P.Ws.10 and 11 may not be of any use. P.W.11 examined P.W.1 after 3 years of the offence and her present version may not be of any use at all for the progress of the prosecution.

12. The learned counsel for the appellant submits that even accepting the evidence as such put forth by the prosecution, the offence punishable

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under Sec.376 IPC has not been made out and the appellant is entitled for acquittal.

13. Per contra, the learned Government Advocate submits that evidence of P.W.1 would substantiate the commission of offence and she has positively stated that on the date of occurrence, she has been forcibly raped by the appellant. The appellant, after coming from the house of P.W.1 on 28.6.1997, was witnessed by P.Ws 4 and 5 and they have also deposed regarding the abortion to P.W.1. P.W.2 and 3, parents of P.W.1 have also corroborated the evidence of P.W.1.

14. The learned Government Advocate has further contended that P.Ws 6 to 8 and 13 are independent witnesses, who conducted Zamath and their evidence cannot be brushed aside lightly. The other witnesses including the medical witnesses corroborate the version of P.w.1 and therefore, the offence punishable under Sec.376 IPC is substantiated.

15. I have perused the materials available on record and heard the submissions made on either side. The evidence of victim may have to be taken for consideration and she will be a star witness in a case of rape. Admittedly, P.W.1, who is aged about 22, was friendly with the accused, who is a neighbour, belong to same community. It is her own admission that the appellant made an attempt like the present one, three months prior to the date of occurrence. She has positively confirmed that the appellant was not in love with her, but his intention is to have sex with her. Under such circumstances, when the accused entered into the residence of the victim girl/P.W.1 on 28.6.1997, the victim would have prevented the appellant effectively. The neighbours viz., P.Ws4 and 5 were available next to her residence. If P.W.1 is not a willing partner, she would have raised hue and cry, which would have attracted P.Ws.4 and 5, thereby she could have prevented the accused from advancing towards her with such intention. But on the face of the materials available on record, especially from her evidence, it appears that she is a consenting partner for the act committed by the appellant/accused. Even at the time of abortion, her parents viz., P.Ws.2 and 3 were not informed. The complaint given to Zamath was very much later, after three years. The promise of the accused that he would marry the victim girl has been stated as explanation for not giving the complaint to the Zamath, but the delay of three years is too longer a period and such an explanation cannot be accepted. Even with regard to the performance of the betrothal for the appellant/accused there are contradictory evidence. It has been positively stated that after coming to know about the performance of betrothal for the appellant, a complaint has been given to Zamath. But on a perusal of the evidence of P.Ws.6 to 8 and 13, no such performance of betrothal was spoken by them. However, it is their positive evidence that the appellant agreed to marry her. Though it has been stated by the members of Zamath that the appellant/accused accepted for marriage, such facts were not informed to the investigating officer at the time of their examination during investigation. Such vital contradiction creates suspicion in the case of the prosecution. The evidence of P.W.1 do not in any way improve the case

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of the prosecution. Though Private medical officer denied the performance of such abortion, he has not been treated as hostile.

16. The evidence of Government Medical Officer for examination of the victim as well as the accused do not in any way improve the case of the prosecution.

17. Again coming to evidence of P.W.1, it appears that she is a consenting party and when she is major. When such materials are available, offence punishable under Sec.376 IPC cannot be made out. Therefore, I am of the considered view that the offence punishable under Sec.376 IPC is not made out and therefore the appellant is acquitted.

18. In a similar case, after acquittal of the accused, the Supreme Court expressed an opinion, which is squarely applicable for the present case on hand. In 2005 SCC (Crl.) 253 (Deelip Singh vs State of Bihar), the Apex Court has held as follows:

> "With this verdict, the appellant no doubt extricates himself from the clutches of the penal law by getting the benefit of doubt on charge levelled against him. But we cannot ignore the reprehensible conduct of the appellant, who by promising to marry the victim woman, persuaded her to have sexual relations and caused pregnancy. The act of the accued left behind her a trail of misery, ignominy and trauma. The only solace is that she married subsequently. We are informed that the female child born out of the illicit relationship is now living with her married mother and she is about 14 years old now. Though there is no evidence to establish beyond reasonable doubt that the appellant made a false or fraudulent promise to marry, there can be no denial of the fact that the appellant did commit breach of the promise to marry, for which the accused is prima facie accountable for damages under civil law".

19. It is submitted by the Government Advocate that since the victim girl has subsequently got married 4 years ago and is settled in life, compensation awarded by the trial court may be received by P.W.2, mother of the victim girl.

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20. The learned counsel for the appellant, on instructions, submits that the petitioner is willing to deposit Rs.10,000/- more, apart from the fine already imposed.

21. There are materials to substantiate that P.W.1 is a consenting party, however, such consent was obtained by the accused by promise of marriage, and such act will amount to breach of promise.

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22. Therefore, the appellant is directed to deposit Rs.10,000/- before the trial court, apart from Rs.20,000/- already deposited. The entire amount of Rs.30,000/- is directed to be given as compensation to PW-1. If the amount of Rs.10,000/- had been already withdrawn by P.W.1, the balance amount, if not, the entire amount of Rs.30,000/- be given to P.W.1. P.W.2 is entitled to withdraw the same on behalf of P.W.1.

23. With this observation the appeal is disposed of. Time for depositing the amount is six weeks.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

sr

To

1. The Sessions Judge(Magalir Neethimandram),
   Coimbatore

2. The Judicial Magistrate, No.I, Coimbatore

3. -do- through the Chief Judicial Magistrate, Coimbatore.

4. The Public Prosecutor, Madras

5. The Inspector,
   All Women Police Station
   B-2, R.S.Puram Police Station

6. The Superintendent, Central Prison, Coimbatore

+ 1 CC To Mr. C.D.Johnson, Advocate SR NO.40319

Crl.Appeal No.742 of 2003

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